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No. 07-1165

Supreme Court, U.S.
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In The
Supreme Court of the United States

MARK E. OVERLAND, PAMELA POLOSKI,
OVERLAND & BORENSTEIN LLP,

Petitioners,

v.

COUNTY OF LOS ANGELES and
SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

REPLY TO OPPOSITION TO PETITION

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INTRODUCTION

The Petition for Writ of Certiorari raises a substantial question concerning Respondents' practice of confiscating interest actually earned[1] on cash bail deposits after exoneration of bail by the court. The practice likely impacts most, if not all of the states and involves substantial amounts of accrued interest. None of the arguments in the Opposition to the Petition for Writ of Certiorari ("Opposition") has merit or bars review by this Court. Instead, Respondents' conduct is a compelling example of a *per se* taking of property, used by the state for what may be a laudable purpose, but in circumstances where the social benefit of general fiscal relief is improperly borne by a minority composed of cash bail depositors. The Petition should be granted.

I. PETITIONERS DO NOT LACK ARTICLE III STANDING.

California law vests the depositor – and only the depositor – with the right to the return of the cash bail deposit. Respondents' claim that Petitioners "are not asserting their own legal rights [since]. . . . they

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[1] The parties stipulated below that cash bail deposits are transferred by the Court to the County and deposited into a interest earning trust account. After exoneration, the principal is returned to the depositor. The interest is kept by the County for general fiscal purposes. *See* JOINT LIST OF STIPULATED FACTS, ¶¶ 3,8,10,12,14 & 19, filed in the Superior Court on or about March 20, 2006.

did not own the money deposited as bail." Opposition, 14, was properly rejected by the California court. *See* Pet. App. 12 (Petitioners' "undisputed status as depositors is sufficient to confer standing.").

Under California law, only the depositor of cash bail has the right to have the cash deposit returned upon termination of the criminal proceedings. Cal. Pen. Code §1297.[2] That statutory command is sufficient to confer standing on Respondents for any accrued interest since in California, and nearly every other state, the right to accrued interest follows the right to the principal. *Pomona City School Dist. v. Payne*, 9 Cal. App. 2d 510, 512 (1935) ("interest is an accretion or increment to the principal fund earning it, and unless lawfully separated therefrom becomes a part thereof.") Petitioners therefore have advanced a sufficient injury in fact, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (Article III standing is met by actual injury caused by the conduct of the defendant), since the Fifth Amendment claim is based on Respondents' confiscation of their

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[2] California Penal Code §1297 provides in part: "If the person to whom the receipt for the deposit was issued was not the defendant, the deposit after judgment shall be returned to that person. . . ." *See* Cal. Pen. Code §§1188 (refund of deposit to "the person or persons found by the court to have deposited said money on behalf of said defendant."); and 1302 (clerk must return bail deposit to original depositor upon surrender of defendant). Respondents stipulated below that they were authorized "to return any cash bail deposit . . . only to the original depositor." JOINT LIST OF STIPULATED FACTS, ¶ 18.

state-created property interest. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) ("[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ."). *See Hudson v. Police Court of City of Oakland*, 39 Cal. App. 149, 150 (1918) (where cash bail is deposited by a third party, cash cannot be used to pay a fine imposed upon the defendant; court must direct its return to the depositor); Cal. Pen. Code §1297 (deduction for fines and penalties from cash bail only if deposited by defendant, but not from bail deposited by third party); Cal. Pen. Code §§1305-1308 (ownership of the cash transfers to the state only if statutory forfeiture procedures are followed).

Respondents contend that because these statutes do not provide for payment of interest to either the owner or the depositor, Petitioners have no standing in this Court. Opposition, 14-15. This curious argument would completely insulate Respondents' confiscation of the interest on bail deposits from constitutional challenge (or any challenge at all) by anyone, since the owner, if different from the depositor, has no right to the deposit under the California cash bail statutes.[3]

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[3] It is inconceivable Respondents are actually advocating a rule that would either allow or mandate someone other than the statutory depositor to obtain a cash bail refund. That rule would open the floodgates to unlimited third party claims and

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Nor is Petitioners standing defeated because they are the depositors and have not alleged "ownership" of the cash deposits. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 158, the Petitioner was the court appointed receiver, who had the right to marshal assets, but was not the "owner" of the accrued interest. The receiver had sufficient standing for this Court to declare a Takings Clause violation, even though the receiver merely sought the accrued interest for unidentified third parties, who perhaps were the "owners."

Likewise, in *Fresno Fire Fighter Local 753 v. Jernagan*, 177 Cal. App. 3d 403 (1986), the only other California decision concerning cash bail and other court deposits, the status as an "owner" was irrelevant; the depositor had standing. There, Plaintiff sought and obtained the interest earned on a preliminary injunction bond deposit under a statute that again authorized return of the bond to the depositor. There was no inquiry as to the source of the cash used for the bond since, for purposes of which entity was entitled to the accrued interest, only the depositor had standing.

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essentially make the County and the Superior Court the arbiter of actual and beneficial claims under the state's property laws. The California Legislature crafted a better solution to avoid placing the Respondents in that very position by specifying that only the original *depositor* is entitled to return of the bail, thereby avoiding any third party dispute over the actual ownership of the bail refund.

Accordingly, Petitioners have Article III standing; they have "alleged such a personal stake in the outcome of the controversy as to warrant [] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf. *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) (*citing Baker v. Carr*, 369 U.S. 186, 204 (1962)).[4]

II. SECTION 1983 AND ELEVENTH AMENDMENT IMMUNITY DO NOT BAR REVIEW.

A. Petitioners Do Not Claim Damages Under 42 U.S.C. §1983.

Respondents claim for the first time after protracted proceedings in the state courts, that, as agents of the state, they "are not susceptible to suit under 42 U.S.C. §1983." Opposition, 17. But Petitioners do not claim compensation pursuant to section

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[4] Article III standing mirrors California law relating to standing. *See Holmes v. California Nat. Guard*, 90 Cal. App. 4th 297, 314-315 (2001) ("standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury"). Respondents also argue that because Petitioners never provided the bail receipt referred to in section 1297, they lack standing. On the contrary, Respondents stipulated below that the superior court clerk independently initiates the refund process "within 5 days after exoneration," and "[s]ince June 6, 1999, the original or a copy of the Bail/Fine Receipt issued with the cash bail deposit was not required in order to obtain a return of cash bail after the bail was exonerated." *See* JOINT LIST OF STIPULATED FACTS, ¶¶ 16 & 17.

1983. Rather, their claims are based on the "self-executing" Fifth Amendment right to compensation for the taking of the interest earned on their cash bail deposits. *See United States v. Clarke*, 445 U.S. 253, 257 (1980).[5]

"[G]overnment action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (*citing Armstrong v. United States*, 364 U.S. 40, 49 (1960)). This Court has consistently recognized that a claim for just compensation for governmental taking is not based on statute, but is inherent in the constitutional protection provided by the Fifth Amendment. *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 315-316 and cases cited therein ("the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution"). *See Chicago, Burlington & Quincy R. Co. v. City of Chicago*, 166 U.S. 226 (1896) (Fourteenth Amendment due process clause provides a substantive prohibition against state takings of private property without compensation equivalent to the express prohibition in the Fifth

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[5] As unpublished opinions, the California decisions cited in footnote 2 of the Opposition have no precedential value and may not be cited. *See* Cal. R. of Ct. 8.1120(a) (decision not published "may not be cited or relied on by a court or a party in any other action").

Amendment against such takings by the federal government).

B. Eleventh Amendment Immunity Is Inapplicable.

Respondents, relying on *Alden v. Maine*, 527 U.S. 706 (1999), also claim, for the first time, they are "entitled to Eleventh Amendment Immunity from suit." Opposition, 17. But *Alden* does not stand for the broad proposition that "[t]he Eleventh Amendment grants an arm of a State . . . immunity from being sued in private litigation in both state court and federal court." Opposition, 21. This Court held in *Alden* that the Eleventh Amendment bars Congress from creating private rights of action that are enforceable against the states in state courts. "[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Alden v. Maine*, 527 U.S. at 712. This case does not implicate a Congressionally authorized cause of action. Rather, Petitioners invoke this Court's long-established precedent[6] that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." *McKesson Corp. v. Division*

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[6] *See Cohens v. Virginia*, 19 U.S. 264 (1821) (rejecting Virginia's Eleventh Amendment challenge to this Court's power on writ of error to review the judgment of a state court involving an issue of federal law).

of Alcoholic Beverages and Tobacco, 496 U.S. 18, 31 (1990). "[W]hen a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case whoever may be the parties to the original suit, whether private persons, or the state itself." *Id.* at 30 (internal quotations and citations omitted). *See South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 165-167 (1999) (declining to overrule *McKesson*). The California courts have "taken cognizance" of this case and cannot insulate themselves from appellate review of the federal constitutional issues herein by seeking solace in the Eleventh Amendment.

C. The Voluntary Deposit of the Cash Bail Does Not Preclude a Challenge To the Involuntary Taking of the Accrued Interest.

The California court below ruled that the voluntary deposit by Petitioners resulted only in a contractual obligation to return the cash deposit in a timely manner and, since the contract did not provide for interest thereon, there could be no Fifth Amendment taking claim. Pet. App. 7-8, 13-14.[7] In effect, the

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[7] The holding that the cash bail statutes create an implied in-law contract is curious at best. It seems no more a "contract" than the inmate trust account between a prisoner and the Department of Corrections, also a creature of statute and discussed in *Schneider v. California Dept. of Corrections*, 151 F.3d 1194 (9th Cir. 1998).

California court erroneously ruled that a determination of the Fifth Amendment claim was precluded by its implied contract analysis.

Whether the initial cash bail deposit was voluntary or not has no constitutional significance. Petitioners have never claimed that the initial deposit of the principal amount of cash bail was a taking for which the Fifth Amendment required compensation. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 234 (2003) (the requirement that client funds be placed in an IOLTA account "is merely a transfer of principal and therefore does not effect a confiscation of any interest"). The entire focus of Petitioners' claims is the accretion of the interest actually earned on the principal amount of the cash bail. The principal was returned; the accrued interest was confiscated.

Whether the initial cash bail deposit is voluntary or coerced is therefore irrelevant to the determination of the constitutionality of the confiscation of the interest earned thereon after exoneration. That interest, under *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998), belongs to the Petitioners as depositors, and Respondents' taking of the interest for general fiscal purposes was undisputedly involuntary. *See Arthur v. District of Columbia*, 857 A.2d 473, 492 n. 23 (D.C. App. 2004) (court found "unavailing" the argument that the Takings Clause did not apply to confiscation of the interest thereon because the deposit was voluntary).

The California court's finding that the terms of the "implied contract do not include a provision for interest on the cash bail deposits," Pet. App. 8, cannot convert the accrued interest from private property to governmental property. Neither the Legislature by statute, nor the court below by judicial decision, can transform property owned by the depositor – the accrued interest on the depositor's cash deposit – simply by reclassifying the property interest as belonging to the state. That is exactly what was condemned in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 164 ("a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power"). *See Schneider v. California Dept. of Corrections*, 151 F.3d at 1200-1201 ("The States' power vis-a-vis property thus operates as a one-way ratchet of sorts: States may, under certain circumstances, confer "new property" status on interests located outside the core of constitutionally protected property, but they may not encroach upon traditional "old property" [such as "interest following principal"]. Were the rule otherwise, States could unilaterally dictate the content of – indeed, altogether opt out of – both the Takings Clause and the Due Process Clause simply by statutorily

recharacterizing traditional property-law concepts").[8] This Court's precedent clearly establishes that the retention by the government of interest earned on principal is a *per se* taking under the Fifth Amendment. *Phillips v. Washington Legal Foundation*, 524 U.S. at 172; *Brown v. Legal Foundation of Washington*, 538 U.S. at 235.[9]

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[8] A long and unreasonable delay in the return of the principal following exoneration might entitle the depositor to damages in tort or contract attributable to the delay. But that issue is quite separate from the Constitutional issue of who is entitled to the interest *actually earned*, that is, the separate quantum of property created on account of the depositor's cash deposit.

[9] Respondents mistakenly contend that no compensable takings claim is available to Petitioners because they failed to avail themselves of the "implied contract" remedy. Opposition, 26-27 and n. 5. Respondents erroneously rely on *Williamson County Regional Planning Com'n v. Hamilton*, 473 U.S. 172 (1985), which holds that any state remedy providing for just compensation must be utilized before resorting to a Fifth Amendment claim. However, California state law alternatives do not provide compensation for interest earned on cash bail deposits, but provide only damages for delay in the return of the principal. Pet. App. 7-8, 13-14. In addition, neither *Ruckelshaus v. Monsanto Co*, 467 U.S. 986, 1016 (1984) nor *Hooe v. United States*, 218 U.S. 322, 335-336 (1910), Opposition, 27, supports Respondents' argument that Petitioners' remedy is "in tort or contract." *Id.* *Ruckelshaus* held the EPA's disclosure of trade secrets was a compensable Fifth Amendment taking, not a tort of contract injury. *Hooe* denied a landlord's takings claim, finding that a government officer had rented property from him for an amount that exceeded express Congressional authority. In contrast to *Hooe*, Respondents' argument is not that the taking of the interest exceeded statutory authority, but rather was pursuant to statutory authority.

D. The Decision of the California Court of Appeal Directly Conflicts With Precedent of This Court and Other Lower Courts.

The decision of the California court below conflicts with this Court's decisions in *Brown, Phillips* and *Webb's Fabulous Pharmacies*, at least two circuit court decisions, *Schneider v. California Department of Corrections*, 151 F.3d 1194; *McIntyre v. Bayer*, 339 F.3d 1097 (9th Cir. 2003); and several state court decisions, including, in California, *Fresno Fire Fighters v. Jernagan*, 177 Cal. App. 3d 403.

Other states have also consistently applied this Court's precedent in a variety of situations, to prevent unconstitutional taking of interest on principal. *See Arthur v. District of Columbia*, 857 A.2d 473; *Moldon v. County of Clark*, 188 P.3d 76 (Nev. 2008) (county placing of interest earned on condemnation deposit into general fund constituted a taking without just compensation); *Sogg v. Ohio Dept. of Commerce*, No. 06AP-883, 2007 WL 1821306, at 4 (Ohio App. 10 Dist. June 21, 2007) (retention of interest earned on unclaimed funds pursuant to state statute violates the takings clause; "unclaimed property is not abandoned property, but rather always remains private property, and pursuant to the 'interest follows principal' rule, the interest earned on private property also constitutes private property"); *B & M Coal Corp. v. United Mine Workers of America*, 501 N.E.2d 401 (Ind. 1986)

(retention of interest earned on appeal bond constituted an impermissible taking).

CONCLUSION

Petitioners respectfully request that this Court grant the Petition for Certiorari.

Respectfully submitted,

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